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In The

Supreme Court of the United States

October Term, 1969

No. 420-Misc. 5001

LYMAN A. MOORE,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition For A Writ Of Certiorari To
The Supreme Court Of Illinois

SUPPLEMENTAL BRIEF UNDER RULE 24 (5)

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IN THE

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OCTOBER TERM, 1969

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THE PEOPLE OF THE STATE OF ILLINOIS,

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May It Please Your Honors:

This brief is filed pursuant to the provisions of Rule 24 (5) of this Court to call attention to a new case decided by this Court since the time of petitioner's last filing on June 19, 1969.

On March 31, 1970, in the case of *In re Winship*, ... U.S. ....., 25 L. Ed. 2d 368, 375, this Court held:

> "Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

We were sorely tempted to raise the reasonable-doubt issue in our petition for writ of certiorari. It was our central theme in the court below. But this Court had not clearly spoken on the subject. Now, after the explicit holding in *In re Winship*, it becomes a moral imperative.

PETITIONER WAS NOT PROVEN GUILTY BEYOND A REASONABLE DOUBT.

Mr. Justice Schaefer, dissenting, sums up this voluminous record on the reasonable doubt issue as follows:

> MR. JUSTICE SCHAEFER, dissenting:
>
> The case against the defendant consisted of the following: (1) The identification of the defendant by the waitress, Patricia Hill, as the ejected customer who returned to the tavern and shot Bernie Zitek. (2) The identification of the defendant, by Henley Powell, as the man who came into the tavern and shot Bernie Zitek. Powell had not been in the tavern when the customer was ejected. (3) The identification of the defendant by Virgle Sanders as the man, nicknamed "Slick", who bragged of having shot a bartender in Lansing. Two other witnesses testified that the defendant was present in the Ponderosa Tavern at the time of the alleged bragging to Sanders, although they did not hear it.
>
> The trial judge sustained prosecution objections to questions put to Patricia Hill as to when she had

next seen the defendant after the date of the murder. The questions were clearly designed to elicit the circumstances under which she had identified the defendant. The objections were sustained on the ground that the questions went "beyond the examination in chief." Similarly, objections to the efforts of the defense to ascertain the circumstances of the initial identification of the defendant by Henley Powell were sustained. These rulings were erroneous, for the circumstances of an identification clearly relate to its weight. With regard to Patricia Hill, the prosecution attempted to cure the error by eliciting from her on rebuttal the fact that she had viewed lineups on October 31, 1962, and on November 1, 1962. So far as Henley Powell was concerned, the prosecution made no attempt to correct the error.

Donald O'Brien testified that the defendant was not the man ejected from Zitek's tavern. O'Brien was playing cards with Henley Powell and others when the shot was fired. His back was to the bar and the door and he did not see the killer, although he ran out the door after him. O'Brien also testified that Patricia Hill was the only one of 7 persons who had been in Zitek's tavern that night who identified the defendant in the November 1, 1962, line-up. None of those other persons, including the other participants in the card game, was called as a witness.

The defense presented the uncontroverted and unimpeached alibi testimony, unmentioned in the majority opinion, of the head bartender and the general manager of the Westmoreland Country Club in Wilmette. Both testified, and the employment records of the Club showed, that the defendant was employed as a cocktail waiter until after midnight on the night of April 25, 1962, the date of Zitek's murder. He was paid overtime for that work.

On this record, in view of the strong alibi evidence, the testimony of O'Brien, the successful effort of the

prosecution to conceal the circumstances under which its witnesses first identified the defendant and the failure of the prosecution to account for those who did not identify the defendant, I am unable to conclude that the defendant's guilt was established beyond a reasonable doubt. (App. 12a-14a)

THE STRONG ALIBI EVIDENCE UNMENTIONED IN THE MAJORITY OPINION.

As pointed out by Mr. Justice Schaefer in his dissenting opinion, uncontroverted and unimpeached alibi testimony in the case at bar is unmentioned in the majority opinion. (App. 13a)

Where was petitioner Moore on the evening of the murder at 10:55 P.M.? Working as a cocktail waiter in a country club over 50 miles from the scene of the crime. (A. 109)

The head bartender of the Club testified that he kept employment records upon which the cocktail waiters were paid (A. 96); that petitioner Moore served from 5:00 P.M. until 1:30 or 2:00 A.M. (A. 97) and was paid overtime for working that evening. (A. 99) He saw him personally because he and the petitioner had the same room. (A. 100)

The general manager of the Club testified that his records indicate that petitioner Moore was paid overtime for April 25th, 1962. (A. 106)

He testified that each department head has a responsibility of maintaining his time book; that at the end of each pay period they are sent up to the auditor's office where they are transferred to the official payrolls; that his duties included checking the book and also checking the employees as against the book. (A. 107)

He checked to see whether petitioner Moore was working between 8:00 P.M. and midnight. He testified that he defi-

nitely would know if petitioner Moore was not there for an hour or more. (A. 108)

How many cases that involve undisputed work-record alibi evidence ever reach review? We found only one. *Regina* v. *Boyd,* (1953) Ont. 215.

The majority could not get around the fact that petitioner Moore could not be in two places at the same time. So, they simply ignored it.

VIRGLE SANDERS' TRIAL TESTIMONY THAT PETITIONER MOORE WAS THE MAN WHO BRAGGED THAT HE HAD SHOT A BARTENDER IN LANSING WAS IMPEACHED BY FACTS DEVELOPED AT THE POST CONVICTION HEARING.

Mr. Justice Schaefer points out in his dissenting opinion that prosecution witness Sanders' trial testimony was seriously impeached if not destroyed by facts developed at the post conviction hearing. (App. 16a)

Virgle Sanders testified at the trial that he knew the petitioner Moore; that he had seen him before a number of times; that he knew him only by the nickname "Slick"; that he saw him in the Ponderosa tavern two days after the murder (A. 41-42); that "Slick" knew that Sanders tended bar part time and that he said, "Virgle, it's open season on bartenders. I shot one in Lansing, Wednesday night." (A. 44, 47, 351)

Facts developed at the post conviction hearing reveal that when Virgle Sanders first laid eyes on petitioner Moore at the trial, he said to Lt. Turbin and other Lansing police officers, in the presence of the prosecutors, "The guy that I knew as 'Slick' looked to be about 30 or 40 pounds heavier than this guy." (A. 294) The Lansing police officers

said, "Well, you know how those jailhouse beans are." (A. 295)

Virgle Sanders also testified on post conviction that he saw the man that he knew as "Slick" in Wanda and Del's tavern *before Christmas of 1961.* (A. 295) When confronted with the fact that petitioner Moore had been incarcerated in a federal penitentiary until March 4, 1962, he admitted that it was *impossible* for petitioner Moore to be the man that he knew as "Slick" who two days after the murder bragged that he had shot a bartender in Lansing. (A. 296)

PETITIONER MOORE IS NOT THE MAN WHO BRAGGED TO SANDERS THAT HE SHOT THE BARTENDER IN LANSING.

Mr. Justice Schaefer points out in his dissenting opinion that there is convincing evidence that petitioner is not the man who bragged to Sanders that he shot a bartender in Lansing. (App. 16a)

Facts developed at the post conviction hearing revealed that the Lansing police knew that Delbert Jones was the proprietor of Wanda and Del's tavern and that Virgle Sanders, William Leon Thompson, and the man known only as "Slick" were patrons of Wanda and Del's tavern. They all knew each other. (A. 254, 271, 283, 291, 293, 298, 336)

1. The Lansing police had spoken to Thompson in the Ponderosa tavern three days after the homicide, at which time Thompson told them that he had heard about the bragging incident by "Slick" on the previous afternoon. (A. 265, 281-284)

2. On Monday, April 30, 1962, at 8:50 P.M. Sanders gave a written statement to the Lansing police in which he related the statements made by "Slick" on Friday afternoon in the Ponderosa, and stated, ' 'I have bumped into this guy in and around Dolton, and at Wanda and Del's in Roseland, 119 Union. The first time I met him was about six months ago . . ." (A. 351)

3. That same night the Lansing police raided Wanda and Del's tavern, looking for "Slick". The owner-bartender Delbert Jones told them that he knew and could identify the man known as "Slick" (A. 254).

WHEN PETITIONER MOORE WAS ARRESTED THE LANSING POLICE CONTACTED ONLY ONE OF THE THREE PEOPLE WHO COULD IDENTIFY "SLICK". WHEN THAT PERSON TOLD THEM THAT PETITIONER MOORE WAS NOT "SLICK", THE LANSING POLICE AVOIDED THE OTHER TWO.

Petitioner Moore was arrested on October 31, 1962. (A. 58)

The Lansing police took a photograph of petitioner Moore to the home of William Leon Thompson (A. 251, 272, 361) and he told them that it did not resemble the man called "Slick". (A. 255, 267, 273, 278) The Lansing police told Thompson that they were going to take him to view petitioner Moore in person but they never did. (A. 278)

The Lansing police did not contact Delbert Jones to have him view and identify petitioner Moore as the man known as "Slick" (A. 255, 336-337), nor was he shown the photograph of petitioner Moore that was shown to Thompson (A. 336-337, 347).

Virgle Sanders was not permitted to look at petitioner Moore until May 13, 1964, over two years later, when he was brought to court to testify at the trial (A. 294).

At the post conviction hearing Delbert Jones testified that he had seen a photograph of petitioner Moore and said that he was not the man called "Slick". (A. 333) Jones saw petitioner Moore in person in the Cook County Jail on December 23, 1964, and said that he was not the man known as "Slick". (A. 337)

William Leon Thompson testified that petitioner Moore was not "Slick"; did not resemble "Slick". (A. 272-273)

And Virgle Sanders testified on post conviction that it would have been impossible for petitioner Moore to have been the man called "Slick". (A. 296)

JAMES E. "SLICK" WATTS VOLUNTARILY CONFESSED TO VIRGLE SANDERS THAT HE MURDERED BERNIE ZITEK .

Mr. Justice Schaefer in his dissenting opinion points out: "despite the majority's assertion to the contrary, there is substantial evidence that "Slick" Watts, and not the defendant, was that man." (App. 16a)

The Lansing police had a suspect by the name of James E. "Slick" Watts, and a photograph of him in their file. (A. 275) Chief Braschler assigned Lt. Turbin to "look for" "Slick" Watts. (A. 346)

Thompson testified on post conviction that he knew the man called "Slick" (A. 271) who frequented Wanda and Del's tavern in the fall of 1961 (A. 273).

Thompson was shown photographs of James E. Watts, and he testified that they were photographs of "Slick" (A. 274, 275, 276, 277, 278, 362).

At the post conviction hearing, Delbert Jones identified a photograph of James E. Watts (A. 274, 362) as the man known as "Slick" that used to come into his tavern in the fall of 1961. (A. 332, 334-335)

Mr. Justice Schaefer says that if the jury had known the facts developed on post conviction they may have been unwilling to act upon the identifications of Patricia Hill and Henley Powell. (App. 16a)

THE IDENTIFICATION TESTIMONY IS NOT CLEAR AND CONVINCING.

The killing occurred in a matter of seconds. (A. 32) The assailant was a stranger to all concerned. (A. 29)

Patricia Hill

Over six months elapsed between the crime and the "identification" of petitioner Moore by Patricia Hill on November 1, 1962. (A. 144) She was the only one of 7 persons who had been summoned by the Lansing police to view that lineup that identified petitioner Moore. (A. 116) Patricia Hill had viewed a lineup on the night before in which petitioner Moore was present. She did not identify him at that time. (A. 31, 116, 145)

Henley Powell

Henley Powell "identified" petitioner Moore for the first time two years and one month after the shooting (A. 143). Powell testified that he saw the shooting (A. 32) but there is a diagram that was uncovered in the post conviction proceeding that contradicts him and shows him to be facing away from the shooting. (A. 358, 360) He was never invited to view petitioner Moore until the day he testified against him in court (A. 143). Also there is a statement in the State's Attorney's file that he gave to Detective Mori-

arty on January 10, 1967, in which he said that when he saw petitioner Moore in court "he was thinner, his cheek bones were protruding more than when he shot Bernie". (page 3)

THE TESTIMONY OF DEFENSE WITNESS O'BRIEN IS CORROBORATED.

Donald O'Brien testified for the defense that he did not see who fired the shot, but that petitioner Moore was *not* the man that the deceased ejected at 10:00 PM (A. 114, 116, 117).

Patricia Hill testified that the man that was ejected at 10:00 PM is the man that returned at 10:55 PM and shot the deceased (A. 25-26).

O'Brien is corroborated by "the uncontroverted and unimpeached alibi testimony, unmentioned in the majority opinion" (App. 13a) which also shows Patricia Hill to be mistaken when she "identified" petitioner Moore.

CONCLUSION.

Under the provisions of Rule 24 (5) of this Court and the recent explicit holding in *In re Winship,* .... US ...., 25 L Ed. 2d 368, 375, that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necesssary to constitute the crime with which he is charged, petitioner prays that your Honors will consider the following additional question presented for revew:

Q. Whether the petitioner was proven guilty beyond a reasonable doubt?

Petitioner further prays that your Honors will grant certiorari, and after being fully advised in the premises answer that question in the negative and reverse the judgment of the court below.

Respectfully submitted,

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